



Confidentiality for Mediators

SAF/GCD



Overview

- ❖ Sources of confidentiality in mediation.
- ❖ What is protected under the ADRA?
- ❖ What can be disclosed, and by whom?
- ❖ Mediation scenarios.
- ❖ What alternatives are available?
- ❖ The Waiver Clause.
- ❖ Rules to Remember.



Sources of Confidentiality


- ❖ Mediation Standard 4, **Confidentiality**: “A mediator shall adhere to the legal requirements and maintain the reasonable expectations of the parties with regard to confidentiality.”
- ❖ ADRA, 5 U.S.C. § 574(a): “...[A] neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication provided in confidence to the neutral...”



What Is Protected?

“Dispute Resolution Communication.” A communication that:

- ❖ Occurs between the time a neutral was appointed and specified parties began participating, until the ADR proceeding is terminated.
- ❖ Is made for the purposes of the ADR process, and not otherwise discoverable before mediation began.
- ❖ Is provided by a party to the neutral in confidence, or generated by the neutral and provided to the parties in confidence.



What is Protected? Communication Given “In Confidence”

- ❖ A communication is given in confidence if given—
 - ❖ With the express intention that it be confidential, **OR**
 - ❖ Under circumstances creating a “reasonable expectation” of confidentiality.
- ❖ Examples—
 - ❖ Statements made by a party to the neutral in private caucus.
 - ❖ Statements by the neutral to a party in private caucus.
 - ❖ Statements generated by the neutral and given to the parties.
 - ❖ Case evaluations.
 - ❖ Outcome prediction.



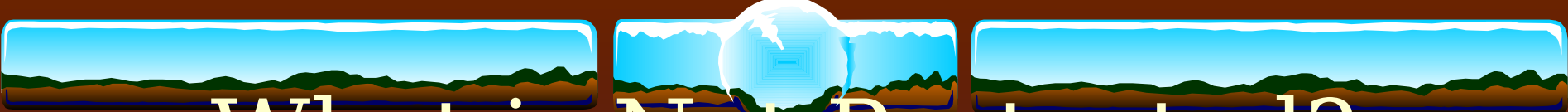
What is Protected?

❖ Protected:

- ❖ Written or oral communications made to or generated by the neutral during a dispute resolution proceeding.
- ❖ Memoranda, notes, and work product of the neutral, a party, or a nonparty participant for the purposes of a dispute resolution proceeding.

❖ Not Protected:

- ❖ Agreements to enter into ADR.
- ❖ Settlement agreements, arbitration awards.
- ❖ Communications subject to a statutory exception.

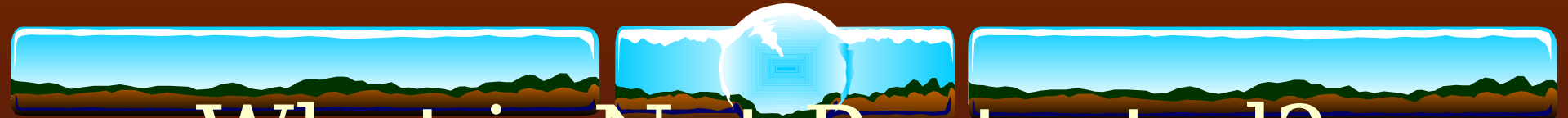


What is Not Protected?

Communications a *Neutral* May Disclose

The *neutral* may disclose a dispute resolution communication when:

- ❖ All parties consent in writing.
- ❖ The information has already been made public.
- ❖ The information is required by statute to be made public.
- ❖ A court determines disclosure is necessary to: 1) prevent manifest injustice; 2) help establish a violation of law; or 3) prevent harm to the public health or safety, *and* this interest outweighs the loss of confidentiality.



What is Not Protected?

Communications a *Party* May Disclose

A *party* may disclose a dispute resolution communication when:

- ❖ Same four circumstances that exist for the neutral, PLUS
- ❖ It's the party's own communication.
- ❖ The communication is relevant to determine the existence or meaning of a settlement agreement or its enforcement.
- ❖ Except for communications *generated by the neutral*, the communication is provided or available to all parties (e.g., opening statements, other party-party discussions in joint sessions may be disclosed *by the parties*).



What is Not Protected?

Exceptions Available to Anyone

- ❖ Information that is otherwise discoverable isn't made confidential by presenting it in an ADR proceeding.
- ❖ Information and data necessary to document a settlement agreement or award aren't confidential.
- ❖ Communications may be used to resolve a dispute between a party and the neutral, but only to resolve the dispute.

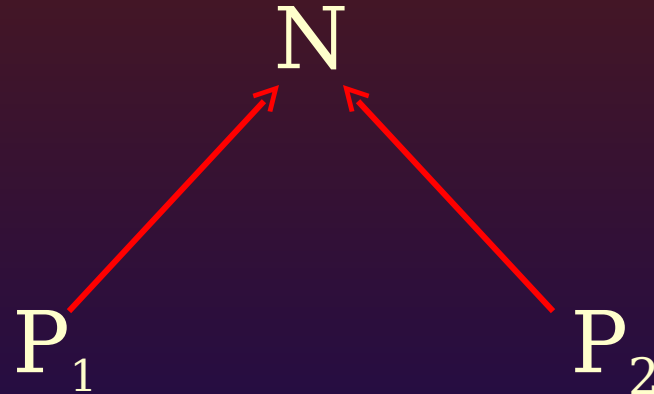


Remedies for Violations

- ❖ ADRA, § 574(c):
 - ❖ Any information disclosed in violation of either subsection (a) or (b) is not admissible in any proceeding relating to the issues in controversy with respect to which the communication was made.
- ❖ Confidentiality standard of conduct:
 - ❖ Breach of confidentiality by mediator is an ethical violation, punishable by sanctions available for such violations.



MEDIATION SCENARIOS: Joint Session



Confidential?

For Neutral: Maybe

For Parties: No



MEDIATION SCENARIOS: Joint Session

N



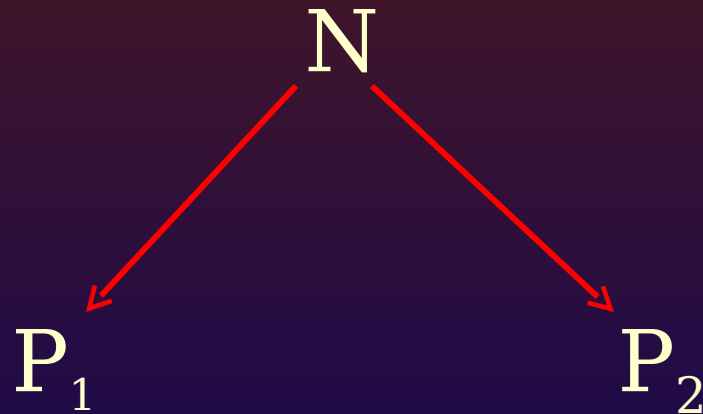
Confidential?

For Neutral: Maybe

For Parties: No



MEDIATION SCENARIOS: Joint Session



Confidential?

Yes



MEDIATION SCENARIOS: Private Caucus

N
↓ ↑
P₁

N
↓ ↑
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Confidential?

Yes



Alternatives to the ADRA: FRE 408

- ❖ Limits admissibility of previous “offers of compromise” (i.e., settlement discussions)
- ❖ More limited than ADRA protection—
 - ❖ Applies only in subsequent litigation
 - ❖ Applies only to proof of liability; if prior settlement offer is used to prove something else, it can be admitted for that purpose.



Alternatives to the ADRA: Contractual Provisions

- ❖ Clause in agreement to participate in ADR.
- ❖ Clause in settlement agreement.
- ❖ Protection is limited—
 - ❖ Only bind parties to agreement.
 - ❖ Questionable enforceability.
 - ❖ Agreement itself may be releasable to third parties under FOIA.



Alternatives to the ADRA: FOIA/Privacy Act

- ❖ FOIA exemption 6: unwarranted invasion of personal privacy.
 - ❖ Personal information contained in personnel, medical, and similar agency records.
- ❖ Privacy Act: Consent to release, official need, or other statutory justification for release.



Alternatives to the ADRA: Protective Orders

- ❖ Issued by court or administrative judge
- ❖ Prohibit parties from publicly disclosing information subject to the order
- ❖ Violations punishable by contempt or other sanction
- ❖ Generally require that there be an ongoing legal or administrative adjudicative action.



The Waiver Clause

- ❖ The ADRA requires a neutral served with a disclosure demand to notify parties; parties must agree to defend neutral against the demand within 15 calendar days, or the ADRA's confidentiality protections are waived.
- ❖ Lessons for neutrals:
 - ❖ If information is demanded, get advice on releasability from SJA; don't just disclose.
 - ❖ Contact SAF/GCD when confidentiality may be breached.



Rules to Remember

- ❖ Dispute resolution communications made by a party to the mediator during mediation are confidential and may not be disclosed by the neutral, unless an exception applies.
- ❖ Dispute resolution communications generated by the neutral and provided to the parties are confidential and may not be disclosed by the neutral or the parties, unless an exception applies.
- ❖ Dispute resolution communications available to all parties during mediation are not confidential as to the parties, but *may* be confidential as to the neutral.



Rules to Remember

- ❖ If an exception applies, communication may be disclosed.
- ❖ Limited alternatives to protect confidentiality, e.g., FRE 408, contractual clauses, may be available.
- ❖ Upon a discovery request or other demand for information that may be confidential, don't disclose until SJA, proper ADR authorities and SAF/GCD are consulted.